

))

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6025 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

BHIKHABHAI KESHAVLAL PATEL

Versus

ELECTION OFFICER, DIST.CENTRALCOOP.BANK LTD.& DY.COLLECTOR

Appearance:

1. Special Civil Application No. 6025 of 2001
MR K.G. VAKHARIA, SR. COUNSEL, MR. N.D. NANAVATI,
SR. COUNSEL ASSISTED BY MR. MEHUL VAKHARIA,
FOR MR. TUSHAR MEHTA for Petitioner No. 1
MR. A.D. OZA, G.P. WITH MR. H.C. PATEL, AGP,
for Respondent No. 1 & 2
MR. K.S. ZAVERI for respondent No. 3
MR SP HASURKAR for Respondent No. 4
MS. AVNI S. MEHTA for respondent No. 5

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 09/08/2001

C.A.V. JUDGEMENT

1. Bhikhabhai Keshavlal Patel-petitioner has filed this petition praying for a writ of mandamus or writ in the nature of mandamus or any other appropriate order or direction quashing and setting aside the order dated 24.7.2001 passed by the Election Officer-respondent No. 1 for the election of Mehsana District Central Co-operative Bank Ltd. (hereinafter referred to as 'the Bank'). By the said order, the Election Officer has rejected the Nomination Form of the petitioner to be elected in the Director of the Bank for which election was to be held on 10.8.2001.

2. The facts giving rise to this petition are as under:-

2.1(a) It has been contended that there is no dispute about the fact that Mehsana District Central Co-operative Bank Ltd.-respondent No. 5 is a specified society falling within the purview of the provisions of Chapter XI-A of the Co-operative Societies Act providing for elections of Committees and Officers of certain Societies. The said Chapter applies to the societies belonging to any of the categories specified in Section 74C of the Act. Respondent No. 5 is admittedly a specified society as contemplated by the provisions of the said Chapter. There is also no dispute about the fact that the elections to the Board of Directors of the respondent bank are governed by the Gujarat Specified Co-operative Societies Elections to Committees Rules, 1982.

2.1(b) The petitioner submits that election programme of respondent No. 5 Bank was published on 16.6.2001.

2.1(c) The petitioner states that the petitioner is a contesting candidate for the election of the members of the Managing Committee of respondent No. 5-Mehsana District Central Co-operative Bank Ltd. The petitioner is a sitting Director (Member of the Managing Committee) of respondent No. 5 Bank and is elected as a delegate of Rangpurda Seva Sahkari Mandali Ltd. He is also Chairman of the said Society.

2.2 The petitioner states that his name was duly sent by the Rangpurda Seva Sahkari Mandali Ltd. as its authorised delegate by passing a valid Resolution which was sent to respondent No. 5 Bank as required under Rule 5(2) of the Rules 1982. Respondent No. 1 Election officer finalised the voters' list and published the same on 7.7.2001 in which the petitioner's name is duly

mentioned as a voter for the election of the members of the Managing Committee of respondent No. 5 Bank. Respondent No. 1 published the election programme on 16.6.2001. A copy of which is annexed at Annexure-B to the petition (on page 28).

2.3 After the election programme was published on 16.6.2001, the petitioner filed his nomination form on 20.7.2001. It has been stated that respondent No. 4 i.e. Shri Nitinbhai Patel, Hon'ble Minister for Small Irrigation and Road & Building Department, pressurised respondent No. 2 to file a complaint dated 20.7.2001. A copy of the complaint has been produced at Annexure-C on page No. 29 to the petition.

2.4 The petitioner has averred that he has filled in his Nomination Form on 20.7.2001 in the prescribed form given by respondent No. 1 and the Nomination Form was strictly in accordance with Rules 18, 19, and 21 of the Rules of 1982.

2.5 It was further submitted that the date of scrutiny of the Nomination Form was 23.7.2001. On the said date, respondent No. 3, namely, Shri Arvindbhai Vithalbhai Patel, filed an objection containing allegations against the petitioner. A copy of the said allegation has been annexed at Annexure-D to the petition. As the petitioner came to know about the said objection being lodged behind his back, he made an application dated 23.7.2001 pointing out that an attempt is being made at the instance of respondent No. 4 to get his Nomination Form rejected. A copy of the said application is annexed at Annexure-E to the petition. In the said application the petitioner has also pointed out that he has not incurred any disqualification on the basis of which his Nomination Form can be rejected.

2.6 It has been submitted that despite pointing out all the above facts to respondent No. 1-Election Officer, he has proceeded to pass the order on 24.7.2001 rejecting the petitioner's Nomination Form without giving an opportunity to the petitioner to rebut the allegations made against him.

2.7 Mr. K.G. Vakharia, learned sr. counsel along with Mr. N.D. Nanavati, learned sr. counsel, assisted by Mr. Mehul Vakharia, learned advocate, appeared on behalf of the petitioner. He has invited my attention to several provisions of the Act and the Rules. He has invited my attention to Section 23 of the Co-operative Societies Act, 1961 (hereinafter referred to as 'the

Act') which provides removal from membership in certain circumstances. Section 23 of the Act reads as follows:-

"23(1) - Where a person becomes a member of any society on his making a declaration as required by the bye-laws of the society or otherwise and such declaration is found to be false, then such person shall be disqualified to continue as a member of the society.

23(2) - Where a person continues as a member of the society notwithstanding the disqualification incurred by him (under sub-section (2) of Section 22 or under sub-section (1)), he shall be removed from the society by the Registrar.

Provided that the Registrar shall, before making an order of removal give the person an opportunity of being heard."

2.7(a) The learned counsel has also invited my attention to Section 145F of the Act which provides disqualification for membership. Section 145F of the Act reads as under:-

"Sec. 145-F - (1) A person shall be disqualified for being elected, as, and for being a member of the committee of any specified society -

(a) to (d) xxxxx

(e) If he is also disqualified by or under any other provision of this Act."

2.8 Section 145U which provides disputes relating to elections to be submitted to the Tribunal. Section 145U of the Act reads as follows:

"Sec. 145U(1) - Notwithstanding anything contained in Section 96 or any other provisions of this Act, any dispute relating to an election shall be referred to the Tribunal.

(2) - Such reference may be made by an aggrieved party by presenting an election petition to the Tribunal.

Provided that no such petition shall be made till after the final result of the election is

declared and where any such petition is made it shall not be admitted by the Tribunal unless it is made within two months from the date of such declaration."

2.9 He has further invited my attention to Section 147 which provides offences. Section 147(1)(a) reads as under:-

"Sec. 147 - Offences (1) It shall be an offence under this Act if -

(a) any person makes a declaration referred to in section 23 which he knows or has been reason to believe to be false. "

2.10 Section 148 of the Act provides punishments for offences under Section 147 of the Act. Section 149 of the Act provides cognizance of offences.

2.11. In view of the aforesaid provisions of the Act, the learned counsel for the petitioner submitted that for committing offence there must be an order of Registrar under Section 23 of the Act disqualifying the member. Unless the said order is passed, there will not be any offence under the provisions of the Act.

2.12 The learned counsel for the petitioner has also invited my attention to Rule 24-A of the Gujarat Co-operative Societies Rules, 1965 (hereinafter referred to as 'Rules 1965') which provides restrictions on borrowing from more than one credit society. He has also relied on Rule 32 of Rules 1965 which provides qualifications for the members of the committee. Rule 24-A of the Rules 1965 reads as follows:

"Rule 24(1) - Every person who is member of more than one society (other than a Land Development Bank or a Central Bank or a Marketing Society) dispensing credit shall unless he has already done so, make a declaration in form DD that he will borrow from, or accept the responsibility of a surety in one society only to be mentioned in the declaration and shall send a copy of such declaration duly attested to all other societies through such society.

- (2) - Any person, who continues to be member of more than one society without complying with the provision of sub-rule (1) shall be liable to be removed from the membership of any or all such societies upon receiving a written requisition from the Registrar to that effect:

Provided that the societies in whose favour declaration as per sub-rule (1) has been made by a member, may with the prior approval of the Central Financing Agency to which it is affiliated permit him to borrow from any other society of which he is a member to such extent and subject to such conditions as may be laid down by it."

Rule 32 of the Rules 1965 reads thus:

"Rule 32(1) - Every member of a society who is entitled to vote shall be eligible for appointment as a member of a committee thereof if -

(a) he is not in default in respect of any loan taken by him for such period as is specified in the bye-laws, or

(b) xxxxxxxx

(c) if he is not otherwise disqualified for appointment as such member.

2.13 The learned counsel for the petitioner further invited my attention to the Gujarat Specified Co-operative Societies Elections to Committees Rules, 1982 (hereinafter referred to as 'Rules 1982') particularly Rule 23 which provides for scrutiny of nomination papers. Rule 23 of the Rules 1982 reads as under:

"Rule 23(1) - On the date fixed for the scrutiny of nomination papers under rule 16, the candidates, their election agents, one proposer of each candidate, and one other person duly authorised in writing by each candidate, but no other person, may attend at the time and place appointed in this behalf under rule 16, and the Returning Officer shall give them all reasonable facilities for examining the nomination papers of all candidates, which have been delivered as required by rule 19.

(2) The Returning Officer shall then examine the nomination papers and shall decide all objections which may be to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds, that is to say:

(a) that the candidate is disqualified for being chosen to fill the seat by or under the Act, Rules or bye-laws."

(b) to (d) xxxxxx

(3) xxxxxxxx

(4) The Returning Officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.

(5) xxxxxxxxxxxx

(6) The Returning Officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected shall record in writing a brief statement of his reasons for such rejection."

2.14 The learned counsel for the petitioner has invited my attention to order dated 24.7.2001 passed by the Election Officer Annexure-A by which the Election Officer has rejected the Nomination Form of the petitioner. He has submitted that the Election Officer has rejected the Nomination Form of the petitioner only on the ground of Section 23, Section 147(1)(a) of the Act to be read with Rule 24-A and Rule 32(1)(c) of Rules 1965 read with Rule 23(2)(a) of Rules 1982. He submitted that the only allegation against the petitioner is that he has obtained loan from two Mandalis and therefore none of the provisions of the Act and Rules which have been referred by respondent No. 1 apply to the facts of the petitioner's case. He submitted that Section 147(1)(a) of the Act provides for offences to be made in certain circumstances. He submitted that Rule 24-A of the Rules 1965 only provides restrictions on borrowing from more than one credit society. However, when the complaint is filed and the same is not adjudicated, it will not amount to an offence and therefore also the order of respondent No. 1 is bad in law.

2.15 He has submitted that the Registrar has no power

to do anything in the matter except sending a written requisition to the society requiring the society to remove the petitioner from the membership. He submitted that the Registrar has invoked Rule 24-A of Rules 1965. However even if it is assumed that the facts narrated in the complaint are true, it is not a disqualification either under Rule 32 of Rules 1965 or any other provisions of the Act including the provisions contained in Section 145F of the Act. He further submitted that respondent No. 1 has committed a serious error in rejecting the petitioner's Nomination Form by relying on Rule 23 of the Rules 1982 and Section 147(1)(a) of the Act. He submitted that nomination paper can be rejected under the aforesaid provisions only if the candidate is disqualified under any of the provisions of the Act, Rules or bye-laws. There is no such provision either under the Act, Rules or Bye-laws under which the petitioner stands disqualified. He has submitted that there is no specific order disqualifying the petitioner.

2.16 On the facts of the case, the petitioner has already tendered his resignation from Kadi City Seva Sahkari Mandali Ltd. which is also accepted by the said society by passing a Resolution on 10.6.2001. The learned counsel further submitted that the petitioner could have pointed out that he had already repaid the loan in both Co-operative Societies during the relevant period, if an opportunity of being heard to the petitioner was given. The petitioner had repaid the loan in both the Societies during the relevant period and therefore there is no justification or jurisdiction to pass the impugned order.

2.17 The learned counsel for the petitioner has relied on the judgement of the Hon'ble Supreme Court in the case of ELECTION COMMISSION OF INDIA VS. ASHOK KUMAR AND OTHERS reported in (2000) 8 SCC 216 particularly para 21 on page 228 which reads thus:

"A third category is not far to visualise. Under Section 81 of the Representation of the People Act, 1951, an election petition cannot be filed before the date of election, i.e. the date on which the returned candidate is declared elected. During the process of election something may have happened which would provide a good ground for the election being set aside. Purity of election process has to be preserved. One of the means for achieving this end is to deprive a returned candidate of the success secured by him by resorting to means and methods falling foul of

the law of elections. But by the time the election petition may be filed and judicial assistance secured, material evidence may be lost. Before the result of the election is declared assistance of Court may be urgently and immediately needed to preserve the evidence without in any manner intermeddling with or thwarting the progress of election. So also there may be cases where the relief sought for may not interfere or intermeddle with the process of the election but the jurisdiction of the Court is sought to be invoked for correcting the process of election taking care of such aberrations as can be taken care of only at that moment failing which the flowing stream of election process may either stop or break its bounds and spill over. The relief sought for is to let the election process proceed in conformity with law and the facts and circumstances be such that the wrong done shall not be undone after the result of the election has been announced subject to overriding consideration that the Court's intervention shall not interrupt, delay or postpone the ongoing election proceedings. The facts of the case at hand provide one such illustration with which we shall deal with a little later. We proceed to refer a few other decided cases of this Court cited at the Bar."

2.18 He has also further relied on the judgement of this court in Special Civil Application No. 5040 of 1999 decided on 24.7.1999 (Coram: M.S. Shah, J). In this case the order of the Returning Officer for election to the Board of Directors of Ahmedabad District Co-operative Bank Ltd. was challenged and the facts in para 6 of the judgement were as follows:

"By his impugned decision dated 14.7.1999, the Returning Officer declined to accept the resolutions dated 6.7.1999 on the following grounds:

- (i) The provisional list of voters was published on 18.6.1999 and the last date for submitting objections was 24.6.1999. The petitioner-society had not lodged any objection before 24.6.1999.
- (ii) Respondent No. 4 Balwantrao was present before the Returning Officer with the representation that he was hale and

hearty. Hence, there was substance in the objection of respondent No. 4 that the previous resolution dated 21.12.1998 was wrongly cancelled by the petitioner-society.

The Returning Officer accordingly decided to continue the name of respondent No. 4 as the delegate of the petitioner-society in the final list of voters also."

2.19 After considering the judgement of this Court in the case of SURENDRASINHAJI JORAWARASINHJI JHALA VS. CHIEF ELECTORAL OFFICER, AIR 1969 GUJ. 292, Section 145U of the Co-operative Societies Act, the court held that the petition under Article 226 of the Constitution of India is maintainable at law. The court also considered the judgement of the Hon'ble Supreme Court in the case of GUJARAT UNIVERSITY VS. N.U. RAJGURU & ORS. 1988 (1) G.L.R. 308 and in para 15 the court observed as under:

"In this view of the matter, the Returning Officer could not have refused to accept the request of the petitioner society to change the name of its delegate. In the impugned decision, the Returning Officer stated that the name of the delegate was changed after 24.6.1999 i.e. after the last date for lodging objections against the provisional list of voters. The ground given by the Returning Officer is irrelevant and flies in the face of the statutory rule permitting the society to change the name of its delegate upto the sixth day before the date appointed for making the nominations."

In paragraph No. 16 on page 15 the court further observed as follows:

"para 16 Hence, the impugned decision of the Returning Officer must be held to be patently illegal and without jurisdiction. The illegality is so apparent on the face of the record that rejecting the petition at this stage and requiring the petitioner-society to file an election petition after the elections are over would not only be a travesty of justice but also frustrate the letter and spirit of the democratic process. The very object of the self imposed rule that the courts shall not interfere with the election process when the election process has commenced is to ensure that the election process

goes on. When the Returning Officer himself commits a patent illegality and rejects the resolution of the petitioner changing its delegate and this is done without any power or jurisdiction, this must be held to be one of the exceptional and extraordinary circumstances justifying the interference of this court with the impugned decision of the Returning Officer."

2.20 Being aggrieved and dissatisfied with the aforesaid judgement, a Letters Patent Appeal No. 1031 of 1999 was filed before the Division Bench of this court (Coram: C.K. Thakkar, Actg. C.J. and K.M. Mehta, J) in December, 1999 and the court held on pages 6-7 as under:

"In the facts and circumstances of the case, in our opinion, no ground is made out by the appellant to interfere with the order passed by the learned single Judge. So far as the maintainability of the petition is concerned, it cannot be gainsaid that ordinarily, in exercise of extraordinary jurisdiction under Article 226 of the Constitution, this court does not entertain a petition when alternative and efficacious remedy is available to the aggrieved party. But it is a matter of discretion and not of jurisdiction of the court. In exceptional cases, in spite of alternative remedy being available, a High Court may interfere with such orders against which alternative remedy is available provided it is satisfied that such interference is necessary. In the instant case, the learned Single Judge has observed that the society could nominate its delegate and accordingly, by a resolution, the present appellant was nominated. But then, by a subsequent resolution, a decision was taken to nominate the petitioner in place of the present appellant and such action cannot be said to be illegal or contrary to law. Moreover, the first respondent Returning Officer observed that the present appellant was hale and hearty. The learned Single Judge, in our opinion, was right in observing that such fact was not relevant and germane in deciding the right of the petitioner society in changing the delegate. Either the right is there or is not there, when such right exists, it could have been exercised at any stage within the period prescribed under the rules. When the said right was exercised within the

prescribed period of six days, the Returning Officer had no authority to interfere with it. Accordingly, the learned Single Judge allowed the petition and we find no infirmity therein."

2.21 He has further relied on the decision of this court in the case of KANJIBHAI BABALDAS PATEL VS. ELECTION OFFICER OF A.P.M.C., VISNAGAR reported in 2001(1) G.L.R. 259 particularly para 10. The relevant portion of paragraph 10 is reproduced hereunder:

"Para 10 - Following aspects are required to be highlighted so as to appreciate the merits of both the petitions.

(1) It is true that, ordinarily, when statutory, special mechanism is provided for determination of the election dispute, the same should be allowed to be resolved in the special election Tribunal.

(2) The jurisdiction of this Court under Art. 226 of the Constitution of India which is extraordinary, plenary, equitable and special can be invoked in exceptional cases when the Court is satisfied that:

(a) The impugned order even in a election matter is ultra vires, like that, in violation of the statutory provisions;

(b) & (c) xxxxxxxx

(3) It cannot be gainsaid that any authority, administrative or quasi-judicial or the Tribunal can pass orders in the light of the statutory provisions. In other words, the impugned order must have the sanction of law, more so in a case like the one on hand where the resultant effect upon disqualification visits the person with serious and severe civil consequences.

(4) xxxxxxxx

(5) The Court would be inclined to interfere with the order of an authority even in case of election matter and even in a case of disqualification when:

- (a) it is ultra vires, like that, it is in
contravention of the mandatory
provisions,
- (b) it is vitiated by mala fides,
- (c) to (g) xxxxxxxx

The above proposition could hardly be countered."

2.22 He has further relied on paragraph Nos. 11 and 24 of the said judgement of this court which read as under:

"Para 11 - In view of the aforesaid settled proposition of law, it would be expedient and appropriate, at this stage, to consider the material and relevant aspects which are, virtually, incontrovertible:

- (1) The nomination form of the petitioner in
the first petition came to be rejected by
virtue of the impugned order of the
respondent Election Officer, as he has
been removed from the membership in
exercise of the powers under Sec. 13(1)
and also Sec. 33(11A) of the Act.
- (2) The removal of the petitioner from the
membership of the Market Committee is
taken as the basis for holding him
disqualified for the subsequent election.
- (3) The respondent, Election Officer, in
course of the hearing, on account of the
three objections raised by the petitioner
in the second petition, has found the
petitioner in the first petition
disqualified and has recorded
disqualification on the basis of the
earlier removal from the membership of
the Market Committee. Thus, two other
points which were raised by the
petitioner in the second petition, are
not, specifically, manifested in the
order.
- (4) Obviously, therefore, there are two
probabilities, either, the said two
grounds are not acceptable, or the said
two grounds were also considered but not
dealt with in the impugned order. Out of

the three grounds, two grounds which are not considered are that (i) the petitioner in the first petition is not eligible to contest from the constituency of an agriculturist, as he has not been able to prove that he is an agriculturist and that (ii) the petitioner in the first petition is a trader and he had also represented for long the traders constituency."

Para 24 - In view of the aforesaid discussions, and the proposition of law highlighted hereinbefore, and considering the relevant provisions of law, the impugned order dated 2nd March, 2000 is required to be quashed. The election is not yet held. The polling date is 13th March, 2000. Therefore, without arresting or postponing the date of election and the process, the impugned order rejecting the nomination of petitioner first petition is quashed and set aside. Special Civil Application No. 1252 of 2000 is accordingly, allowed. Rule is made absolute accordingly. Special Civil Application No. 1411 of 2000 is dismissed and the rule is discharged."

2.23 The learned counsel for the petitioner has also raised contention on mala fide that this order has been passed at the behest of political pressure and not independently.

3. On the other hand learned Government Pleader Mr. A.D. Oza with learned A.G.P. Mr. H.C. Patel appeared on behalf of respondent Nos. 1 & 2 and submitted that the present petition is not maintainable under Article 226 of the Constitution in view of the fact that the petition raises election dispute and the same is governed by Section 145U of the Act.

3.1 Mr. Oza, learned G.P., has invited my attention to the affidavit filed on behalf of respondent No. 1. He has also relied on the affidavit filed on behalf of respondent No. 2 by Mr. N.A. Shaikh. He has tried to support the order passed by respondent No. 1 in this behalf and he has denied that the said order has been passed at the behest of political pressure and not independently.

3.2 Mr. K.S. Zaveri, learned advocate appeared on behalf of respondent No. 3 and has relied on the

affidavit of Mr. Arvindbhai Vithalbhai Patel. He has supported the contention of the State that this court has no jurisdiction to examine the dispute regarding election in view of Section 145U of the Act. He submitted that any order this court may pass will thwart or postpone the election and to that extent the Hon'ble Court has stated that this court should not exercise its jurisdiction. He has relied on the judgement of the Hon'ble Supreme Court in the case of UMESH SHIVAPPA AMBI AND OTHERS VS. ANGADI SHEKARA BASAPPA reported in AIR 1999 SC 1566. In para 4 the Hon'ble Supreme Court has observed thus:

"It is now well settled that once an election is over, the aggrieved candidate will have to pursue his remedy in accordance with the provisions of law and this Court will not ordinarily interfere with the elections under Article 226 of the Constitution. (See in this connection AIR 1977 SC 1703, Para 4, K.K. Shrivastava vs. B.K. Jain). The Court will not ordinarily interfere where there is an appropriate or equally efficacious remedy available, particularly in relation to election disputes. In the present case, under Section 70(2)(C) of the Karnataka Co-operative Societies Act, 1959 any dispute arising in connection with the election of a President, Vice-President, Chairman, Vice-Chairman Secretary, Treasurer or member of Committee of the Society has to be referred to the Registrar by raising a dispute before him. The Registrar is required to decide this in accordance with law."

3.3 He has also relief on the decision of the Hon'ble Supreme Court in the case of ELECTION COMMISSION OF INDIA VS. ASHOK KUMAR AND OTHERS (supra) particularly para 32 which reads as under:

Para 32 - For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:

(1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which

question may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

- (2) Any decision sought and rendered will not amount to 'calling in question an election' if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.
- (3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.
- (4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the court.
- (5) The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The court must guard against any attempt and retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the court's indulgence by filing

a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the court would act with reluctance and shall not act except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material."

3.4 He submitted that any action taken by this court at this stage will thwart the election process and the court should not do the same in this behalf. He has relied on the judgement of this court in Special Civil Application No. 2132 of 1999, 2133 of 1999 and 2134 of 1999 decided on 1.11.1999 (Coram: M.S. Shah, J). In these matters also Letters Patent Appeal was filed and the Division Bench (Coram: D.M. Dharmadhikari, C.J. and C.K. Thakkar, J) in para 9 of the judgement has observed as under:-

"We purposely avoid going into the merits of the contentions advanced in the Special Civil Application, because any opinion expressed by us might prejudice the case of either of the parties in the pending litigations. In our considered opinion, in view of the subsequent event of the society, which the petitioners represent, being characterised as Category "C" and the said action having been upheld by the Co-operative Tribunal, the learned Single Judge in his discretion could have vacated the earlier ex-parte interim injunction order granted to the petitioners. Merely because we may hold a different view, we cannot upset the discretionary order of the learned Single Judge. The discretion has been exercised by the learned Single Judge judiciously, after examining the rival case of the parties. Learned Single Judge was right in coming to the conclusion that, petitioners who are prima facie ineligible to contest cannot be allowed to function as office bearers on the basis of previous election. We are also not impressed by the arguments advanced on behalf of the petitioners that, learned Single Judge could have directed appointment of a custodian through the Registrar in accordance with the provisions of Section 74-D of the Act. That power vests only in the Registrar and it was not open to the

Court to issue any direction or mandate to the Registrar by way of any interim relief. After examining the case of the parties and looking to the balance of convenience, learned Single Judge has vacated the ex parte interim order granted in favour of the petitioners. We find no error in the order of the learned Single Judge so as to justify interference by us in this Intra Court Appeal. Consequently, the appeal is dismissed, but in the circumstances without any order as to cost. Notice stands discharged."

3.5 The learned counsel for the respondents has strongly relied on the judgement of the Supreme Court in the case of ELECTION COMMISSION OF INDIA VS. ASHOK KUMAR AND OTHERS (supra) as well as the decision of the Hon'ble Supreme Court in the case of UMESH SHIVAPPA (supra) and also Section 145U of the Act and contended that the present petition is not maintainable at law and the petitioner must be relegated to the election remedy.

3.6 In my view, Section 145U of the Act provides for filing of the election petition after the election is over. In this case, the election is still not over and therefore, the said remedy is not an alternative and efficacious remedy provided under the law.

3.7 In my view the judgement in ELECTION COMMISSION OF INDIA VS. ASHOK KUMAR AND OTHERS (supra) particularly para 32 which I have extracted in para 3.3 of my judgement particularly para 32(3) of the said judgement provides that under Article 226 of the Constitution of India, this court has jurisdiction if statutory power has been exercised arbitrarily or statutory Board has acted in breach of law. In my view the decision which I have taken cannot interrupt, obstruct or delay the election proceedings in this behalf. Therefore, the judgement of the Hon'ble Supreme Court in ELECTION COMMISSION OF INDIA VS. ASHOK KUMAR AND OTHERS (supra) in fact helps the petitioner particularly para 21 of the judgement which I have already extracted in para 2.17 of the judgement. As regards the other judgement, namely, UMESH SHIVAPPA AMBI AND OTHERS VS. ANGADI SHEKARA BASAPPA (supra) the same judgement deals with the case where the election is already over. In this case the election is not over. Therefore, principles laid down in the said judgements will not help the case of the respondents.

4. I have considered the facts of the case, decisions cited by the learned counsel in support of their contentions. I have also considered the provisions

of the Act, Rules and Bye-laws and the order passed by the District Registrar. In my view as per Section 23 of the Act, before a person can be disqualified to be continued as a member of the society, there must be an order passed by the Registrar after giving an opportunity of being heard. In this case, that fact has not been established. Section 145F of the Act is concerned, it provides disqualification for membership. The clause (e) of Section 145F(1) provides that if he is also disqualified by or under any other provision of this Act, viz. which contemplates that there must be an order of disqualification. Section 147(1)(a) provides when an offence will be committed under the Act. It also provides that action under Section 23 of the Act which he knows or has reason to believe to be false. In my view, as per Section 147(1)(a) of the Act there must be also an order passed by the Registrar in this behalf.

4.1 Rule 24A of the Rules 1965 provides restrictions on borrowing from more than one credit society. From the record of the case though there is allegation that the petitioner has obtained loan from two societies, there must be written requisition from the Registrar to that effect and thereafter order must be passed under Rule 24-A of Rules 1965. Rule 32 of the Rules 1965 provides qualification for the members of the committee. Rule 23 of the Rules 1982 gives power to the Returning Officer to examine the nomination papers and shall decide all objections which may be to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on the ground that the candidate is disqualified for being chosen to fill the seat by or under the Act, Rules or bye-laws. Here the order of disqualification must be published before the Returning Officer exercises his jurisdiction.

4.2 In view of the provisions of the Act, the order passed by the District Registrar at Annexure-A dated 24.7.2001 rejecting the nomination of the petitioner cannot be sustained in the eye of law because the condition precedent for exercising the power under Rule 23 does not exist in this behalf.

4.3 In view of the judgement of this court in Special Civil Application No. 5040 of 1999 (supra) the impugned decision of the Returning Officer must be held to be patently illegal and without jurisdiction. The illegality is so apparent on the face of the record that rejecting the petition at this stage and requiring the petitioner-society to file an election petition after the

elections are over would not only be a travesty of justice but also frustrate the letter and spirit of the democratic process. The very object of the self imposed rule that the courts shall not interfere with the election process when the election process has commenced is to ensure that the election process goes on. When the Returning Officer himself commits a patent illegality and rejects the nomination paper of the petitioner contrary to the statutory provisions or in any view of the matter condition precedent for exercising the power is lacking then the same is done without any power or jurisdiction. In my view the condition precedent for exercising the power under the provisions of the Act and Rules are lacking and therefore there is inherent lacking of jurisdiction in the order of respondent No. 1. This must be held to be one of the exceptional and extraordinary circumstances justifying the interference of this court with the impugned decision of the Returning Officer.

4.4 The said judgement has been confirmed by the Division Bench in LPA No.1031 of 1999. In view of the same I have jurisdiction to consider the illegality and validity of the order passed by the Returning Officer wherein he has rejected the nomination papers.

4.5 In view of the same the petition is allowed. The order passed by the Election Officer - respondent No. 1 is without jurisdiction and is liable to be quashed and set aside.

4.6 The learned counsel for respondents has submitted that the petitioner can file election petition and the same is an alternative remedy provided under the Act and therefore this court may not exercise jurisdiction under Article 226 of the Constitution. In my view election petition can be filed only after the election is over. In this case the election is not over. Therefore, alternative, efficacious remedy provided under the law is not available to the petitioner at this stage.

4.7 In my view the remedy provided under the Act by way of filing election petition cannot be said to be alternative, adequate and efficacious remedy when the authority has passed order contrary to the statutory provisions or ultra vires the provisions of the Act. This court has jurisdiction to exercise writ jurisdiction under Article 226 of the Constitution of India. Therefore, the order passed by the District Registrar is liable to be quashed and set aside.

4.8 In the result the petition is allowed. The order dated 24.7.2001 passed by the Election Officer is quashed and set aside. I direct the respondent No. 1 accept the nomination form and allow the petitioner to contest the election. It will be open for the Election Officer to change the date of election in this behalf.

(K.M. MEHTA, J)
(pkn)

After pronouncement of the judgment, the learned counsel for the petitioner prays for Direct Service. Direct service today is permitted.

Mr.Zhaveri, learned advocate for the respondent No.3 prays for stay of the judgment. The stay of the judgment is granted upto 16th August, 2001. However, in view of the peculiar facts and circumstances of the case, as the election is to be held on 10th August, 2001, I therefore direct the Returning Officer to accept the nomination form of the petitioner and permit him to contest the election. However, the final result of the election of this constituency may not be declared till 16th August, 2001.

9.8.2001 (K.M. Mehta, J.)
pkn/syed